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No. 82-585
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALOHA AIRLINES, INC.,
Appellant,

—v.—

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

—v.—

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AIR TRANSPORT ASSOCIATION OF AMERICA

Air Transport Association of America ("ATA"), an association whose 31 members include the major domestic airlines, submits this brief in support of appellants with the written consent of all parties to these appeals, pursuant to Rule 36.2 of the Rules of this Court.

Hawaii's gross receipts tax, which is the subject of this appeal, is in the opinion of the ATA directly prohibited by 49 U.S.C. § 1513, which bars State taxation of air carriage or of the gross receipts therefrom. Unless the Court so rules on this appeal, ATA members may face a proliferation of similar State taxes.

The ATA has successfully challenged a New York tax on airline gross receipts in *Air Transport Association of America v. New York State Department of Taxation & Finance*, No. 11450-81 (Sup. Ct. Albany Co. June 10, 1982), *aff'd*, No. 43719 (App. Div. 3d Dep't Jan. 20, 1983). (Copies of the unreported decisions in that case are Appendix A hereto.) The Appellate Division's decision is currently on appeal to the New York Court of Appeals.

These State taxes are, and others if permitted will be, a serious burden on ATA member airlines, and the ATA therefore has a major interest in the present appeals which seek to invalidate the Hawaii tax.

SUMMARY OF ARGUMENT

Section 1513 is one part of a comprehensive Federal program to develop and improve the nation's airports and airways. To implement that program, Congress, in 1970, provided for increased Federal assistance to the States in funding airport and airway development, with additional Federal funds to be obtained by new and increased Federal aviation taxes. Section

1513 was enacted in 1973 to prohibit the States from imposing additional taxes on the same gross receipts on which some of the Federal taxes were based. Both the language of Section 1513 and its legislative history make this clear. The court below misread both that language and the legislative history.

In order to protect airlines from the State gross receipts taxes prohibited by Section 1513, the Court should reverse the decision below and hold that the Hawaii tax is invalid.

ARGUMENT

I.

The Legislative Background of Section 1513.

In 1970, Congress enacted "a comprehensive program substantially to expand and improve the national airport and airway system." *Massachusetts v. United States*, 435 U.S. 444, 447 (1978). The program included two statutes. The Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 ("Development Act"), established the Airport and Airway Trust Fund and provided for greatly increased Federal expenditures for airport and airway development. A companion statute, the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 ("Revenue Act"), provided for new and increased aviation taxes to help pay for such expenditures. These taxes were

> "an 8% tax on the price of domestic air passenger tickets, see Revenue Act, § 203, 26 U.S.C. § 4261; a $3 'head tax' on international flights originating in the United States, *ibid.*; and a 5% tax on the cost of transporting property by air, Revenue Act, § 204, 26 U.S.C. § 4271."

Massachusetts v. United States, supra, 435 U.S. at 451. These taxes were "designed to serve the congressional policy of having those who especially benefit from Government activity help bear the cost." *Id.* at 448.

In 1973, Congress supplemented the 1970 legislation by enacting the Airport Development Acceleration Act, Pub. L. No. 93-44, 87 Stat. 88 ("Acceleration Act"). This statute increased the Federal share of airport funding. As part of the Acceleration Act, Congress added a new section, 49 U.S.C. § 1513, to the Federal Aviation Act in order to prohibit the States from imposing taxes on the same air carrier receipts on which the Federal taxes were based. Congress felt that such additional State taxes would be "inimical to the development of a national system funded in large part by uniform federal taxes." S. REP. NO. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. CODE CONG. & ADM. NEWS 1455. Senator Cannon observed that such State taxation was a "form of double taxation which we did not intend when, in 1970, we enacted a national system of aviation user taxation." 119 CONG. REC. 3349 (1973).

II.

Section 1513 Expressly Prohibits State Taxes on Gross Receipts from Air Carriage.

Section 1513 states as clearly as language can that the States are prohibited from taxing air carriage or the gross receipts from air carriage. It provides:

> "(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . ."

This language covers virtually every conceivable method by which a State or local government might attempt to tax air carriage or the gross receipts therefrom and thus add more taxes on top of the Federal tax.

First, Congress made certain that it reached all forms of levy by specifically prohibiting any "tax" (normally a percentage of a certain amount), any "fee" (normally a flat amount per unit of measure), and any "head charge" (a fee per person). It then added the words "other charge" to further ensure against evading the prohibition by a resort to some other label.

Second, Congress broadly defined the subjects which States cannot tax. It prohibited any tax, fee, or charge (1) on "persons traveling in air commerce", or (2) on "the carriage of persons traveling in air commerce", or (3) on the "sale of air transportation", or (4) on "the gross receipts derived therefrom".

Third, Congress extended this prohibition to taxes, fees, head charges, or other charges that are "*directly or indirectly*" on such persons, carriage, sales or gross receipts, thereby barring levies, however characterized, on the same receipts subject to the Federal tax. Indeed, the "directly or indirectly" language is so broad that a tax on an airline's net income, capital stock, surplus or property might be considered a tax "indirectly" on air carriage or the gross receipts therefrom. To make clear that these other State taxes were not prohibited, Congress added subsection (b) to Section 1513. It provides:

> "(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, *net* income taxes, franchise taxes and sales or use taxes on the sale of goods or services . . . ." (Emphasis added)

The words "other than those enumerated in subsection (a)" show that subsection (b) does not affect the prohibitions of subsection (a) but merely explains that other types of taxes are not barred. For example, subsection (b) provides that "net income taxes" are permissible, which only emphasizes that gross receipts taxes are not. There would have been no need to include in subsection (b) any description of taxes by measure if

subsection (a) had not prohibited taxes by measure—*i.e.*, gross receipts taxes.

Subsections (a) and (b) therefore are entirely consistent with one another. Subsection (a) clearly bars all State taxes on gross receipts from air carriage. It does so without regard to what the tax is called or how it is labelled by the State. On the other hand, other State taxes, including the types of taxes mentioned in subsection (b), are not prohibited as long as they are not levied on gross receipts and thus do not duplicate the Federal tax.

In holding that Hawaii's gross receipts tax was not prohibited by Section 1513, the court below misread the language of the statute. In interpreting subsection (b), it ignored the "other than" phrase, and mistakenly concluded that there were "seeming contradictions" between subsections (a) and (b) when in fact the subsections are harmonious. J.S. App. 9.[1]

III.

The Legislative History of Section 1513 Shows that Congress Intended to Prohibit State Taxes on Gross Receipts from Air Carriage.

Section 1513's prohibition on State taxation is clear and unambiguous and therefore should be enforced according to its terms. "The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention." *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, ___ U.S. ___, 51 U.S.L.W. 4195, 4197 (Feb. 23, 1983).

On January 6, 1971, shortly after the enactment of the Development Act and the Revenue Act, the first version of what later became Section 1513 was introduced in the House by Congressman Moss. This bill, H.R. 2337, 92d Cong., 1st Sess. (1971), provided in relevant part:

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1 References in this form are to the Appendix to the Jurisdictional Statement in No. 82-585.

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation . . . ."

No action was taken on the bill in 1971.

In the spring of 1972, Congress began a review of airport funding under the 1970 legislation. On April 19, 1972, shortly after the Senate began hearings, this Court held in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), that the Development Act did not prevent States from imposing "head taxes" on air passengers or on air carriers. That decision, coming in the midst of Congress's review of airport development funding, focused attention on the need to prohibit State head taxes as well as other taxes on the same revenues subject to the Federal tax.

On May 9 and 16, 1972, Congressman Adams, for himself and others including Congressman Moss, introduced two identical bills, H.R. 14847 and 14991, 92d Cong., 2nd Sess. (1972). They were the same as Congressman Moss' 1971 bill except that the language underscored below was added:

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, *on persons traveling in air transportation or* the carriage of persons in air transportation. . . ." (Emphasis added)

The underscored language was in response to the *Evansville* decision and broadened the prior bill to prohibit head taxes.

In the meantime, on May 16, 1972, Senator Cannon introduced in the Senate a State tax prohibition bill, S. 3611, 92d Cong., 2d Sess. (1972), which in relevant part was identical to Congressman Moss' 1971 bill.

On June 27, 1972, Senators Cannon and Magnuson introduced S. 3755, 92d Cong., 2d Sess. (1972), which dealt comprehensively with airport development funding. Included in that bill was the following new version of the State tax prohibition:

> "No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom*, provided, however, that nothing herein shall prohibit a State (or any political subdivision thereof) from the levy or collection of taxes *other than those enumerated above*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services (*other than on the sale of interstate air transportation or any portion thereof*); and further provided, that nothing herein shall prohibit a State (or political subdivision thereof) owning or operating an airport from the levy or collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities (*measured on other than a per-passenger basis*)." (Emphasis added)

The phrase "or on the gross receipts derived therefrom" was added after a Senate subcommittee on Aviation of the Committee on Commerce had heard testimony from Whitney Gilliland, Vice Chairman of the Civil Aeronautics Board. *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Committee on Commerce*, 92d Cong., 2d Sess. (April 25-June 12, 1972). He called the subcommittee's attention to an Ohio tax that was denominated a privilege tax, but was based on "the gross receipts of airline business done in Ohio." *Id.* at 137. It seems clear that the new language prohibiting taxes on "gross receipts" was included for the specific purpose of barring taxes like the Ohio gross receipts tax. Just as Congress had broadened the scope of the prohibition to cover head taxes in reaction to *Evansville*, it further broadened the prohibition to cover gross receipts taxes after learning of the Ohio tax.

The "other than those enumerated" language also appeared for the first time in S. 3755. This language and the lines

following, with some modifications, ultimately became subsection (b). A common-sense reading of the proviso, as it originally appeared in the same sentence as the prohibitory language, compels the conclusion that it was intended merely to clarify that State taxes which did not duplicate the Federal tax were not prohibited.

The language permitting "sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof)" further demonstrates that the only permissible sales taxes were those which were *not* on the sale of air transportation itself—and therefore did not duplicate the Federal tax. Similarly, the final clause providing that States could levy reasonable service charges for the use of airport facilities also expressly stated that such charges could not be measured on "a per-passenger basis"—that is, could not be measured in a way that amounted to a prohibited head tax. In short, this draft of the bill abundantly demonstrates that the proviso language which became subsection (b) was never intended to undermine subsection (a)'s prohibitions.

S. 3755 was considered by the Senate Committee on Commerce in executive session on June 28, 1972, and "favorably reported with one substantive and numerous technical or drafting amendments." S. REP. NO. 1005, 92d Cong., 2d Sess. 7 (1972). The Committee Report explained that the only substantive amendment related to airport development grants, which are irrelevant for our purposes, and that all the other amendments were of a "technical or drafting nature and do not reflect substantive changes in the bill." *Id.* The "technical or drafting" changes, insofar as they related to what became Section 1513, included dividing the single paragraph into subsections (a) and (b), eliminating the last two parenthetical "other than" phrases and adopting language which is the same as the law that was finally enacted a year later, in June 1973.[2] As stated, the Committee Report explains that these were

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2 These changes were made in an amended S. 3755, 92d Cong., 2d Sess. (1972), which was introduced on August 1, 1972.

technical or drafting changes; if dropping the parenthetical phrases had been intended as substantive changes, that undoubtedly would have been fully explained in the Committee report. The parenthetical phrases were undoubtedly eliminated as redundant in view of the prior "other than" language in the bill.

There were no further changes in this section prior to its enactment as Section 1513 a year later, in June 1973. On October 5, 1972, a Conference Report stated that the Senate version of the bill was acceptable to the House. H.R. REP. NO. 1543, 92d Cong., 2d Sess. 3 (1972). The bill was passed, but pocket-vetoed by President Nixon on October 27, 1972.[3]

When the 93rd Congress convened in January 1973, several Congressmen included this prohibition in various bills, H.R. 4082, H.R. 2695, H.R. 4182, H.R. 4213, and H.R. 4214, 93d Cong., 1st Sess. (1973). In the Senate, virtually the same bill that had been S. 3755 was introduced as S. 38, 93d Cong., 1st Sess. (1973). On February 5, 1973, Senator Pearson explained S. 38 as follows:

> "Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.
>
> "If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce."

119 CONG. REC. 3350 (1973).

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3 The pocket veto was of the entire Acceleration Act, for reasons unrelated to Section 1513. *See* 119 CONG. REC. 3348, 3350 (1973).

In March 1973, a House subcommittee held hearings on the airport development aid program. *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. (March 14-27, 1973). Once again, the Ohio tax on gross receipts was brought to Congress's attention. Theodore Koetz, Deputy Tax Commissioner of Ohio, testified in an effort to exempt Ohio's gross receipts tax on airlines from the prohibition. He proposed that the language underscored below be added to subsection (b) in order to permit State gross receipts taxes if they were fairly apportioned to a particular state:

> "(b) Nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services, *privilege or excise taxes, and gross receipts taxes fairly apportioned to a State* . . . ." (Emphasis added)

Id. at 248-49.

This suggestion was not adopted. Once again, its rejection of the Ohio proposal shows that Congress intended to bar any tax on gross receipts from air carriage—no matter what that tax might be labelled or how it might be characterized. The discussion before the House subcommittee included the following:

> "MR. SHOUP. One final question, Mr. Chairman.
>
> "I was interested in your answer to Mr. Dingell's question, whether this was a gross receipts tax. I fail to understand why this is not a gross receipts tax.
>
> "MR. KOETZ. Well, we start off with the total gross receipts of the airline and then break them down only to the in and out of Ohio's portion.
>
> "MR. SHOUP. But it is based on the gross receipts?

"MR. KOETZ. It is based on the gross receipts attributable to Ohio, origination-destination.

"MR. DINGELL. If the gentleman will yield: then it is a gross receipts tax. *It either is an excise tax or it is a gross receipts tax. And I do not think calling it an excise tax is going to make it; so, to be perfectly frank with you.* This is either an excise tax or a gross receipts tax.

"*So really, you have a gross receipts tax*, and the only difference between this and a regular gross receipts tax, for example, on an airline doing business, would be that you would simply say: 'OK fellows, we are only going to charge you on that portion of the business which is done inside the State of Ohio.'

"But the Federal Constitution would prohibit you from levying a tax on business that is done outside the State of Ohio anyway." (Emphasis added)

Id. at 251-52.

In commenting on the Ohio Tax, Congressman Shoup stated:

"I think the problem we have here on the committee on the head tax is not the fact that revenues being raised for a very needed use, but the fact that we made these decisions some years ago that we would take a national view of it, not individual.

And it would seem to me that this type of tax [referring to the Ohio tax] does not differ from a head tax; that each State and each community, if we can justify Ohio's, would be able to add their own excise tax, which I can't see differs from a head tax."

Id. at 250.

After the House hearings, the State tax prohibition as proposed in S. 38 was passed by Congress and signed by the President on June 18, 1973.

The court below did not take account of this legislative history. It concluded that Section 1513 was enacted "in response to" the head taxes held permissible in *Evansville*, J.S. App. 8, and it apparently further concluded that Section 1513 prohibited taxes imposed on passengers but not on airlines. J.S. App. 15-17. Neither of these conclusions is correct. The bill that became Section 1513 had been introduced *before* the *Evansville* decision and was later expanded to prohibit head taxes following *Evansville*. Nor was it limited to taxes imposed on passengers. On the contrary, it explicitly prohibits taxes on air carriage and on gross receipts from air carriage.

IV.

State Taxes on Gross Receipts from Air Carriage Undermine the Purpose of Section 1513.

Appellee has argued that the Hawaii tax is valid because it can be characterized as a "property tax". That characterization, whether or not it correctly describes Hawaii's purpose in enacting the tax, does not permit the Hawaii tax to escape the prohibition of Section 1513. The tax is based on gross receipts, it rises and falls with gross receipts, and if there are no gross receipts there is no tax. Whatever else it may purport to be, the Hawaii tax is also a tax on gross receipts and is therefore barred by Section 1513.

The label by which a State describes a tax is not the test under Section 1513. Congress certainly did not intend that a tax labelled a "franchise tax" or a "privilege tax" or a "sales tax" or a "property tax" could by its label avoid the prohibition of subsection (a) if it was based on gross receipts. If that were possible, subsection (a) would be essentially nullified by subsection (b).[4]

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4 *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977) (where the issue is whether a State tax unconstitutionally burdens interstate commerce, the tax is examined according to its impact, not its label).

Finally, subsection (a)'s prohibition of State gross receipts taxes is logical, fair and consistent with the entire Federal funding program. The Federal taxes collected under the 1970 legislation are not lost to the States; instead, they are deposited in the Trust Fund, from which they are distributed for use in the development and improvement of airports and airways. The Federal government is simply a collector and distributor for the benefit of the States. In requiring these Federal taxes to be paid, it was fair and logical for Congress to prohibit the States from imposing duplicate taxes on the same gross receipts. Section 1513 clearly expresses that Congressional purpose and the States should not be permitted to flout it.

CONCLUSION

For the foregoing reasons, the ATA respectfully requests that the Court reverse the decision of the Supreme Court of Hawaii, and hold that Hawaii's tax on gross receipts from air carriage is prohibited by Section 1513 and is therefore unconstitutional under the Supremacy Clause.

Respectfully submitted,

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March 11, 1983

Opinion of
New York Supreme Court,
Appellate Division,
Third Department, in
Air Transport Association of America v. New York State Department of Taxation and Finance, et al., No. 43719
(January 20, 1983)

Before Honorable T. Paul Kane, Justice Presiding,
Honorable Ann T. Mikoll,
Honorable Paul J. Yesawich, Jr.,
Honorable Leonard A. Weiss,
Honorable Howard A. Levine, Associate Justices

Opinion of the Court per Kane,
Justice Presiding:

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U.S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

> (a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* * * * (emphasis added).
>
> (b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those

> enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

Section 184 (subd. 1) of the Tax Law provides, *inter alia*, that:

> Every corporation * * * formed for or principally engaged in the conduct of aviation * * * for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax", was, *inter alia*, "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts

derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P. 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the ex-

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* Plaintiff does not challenge the tax on other categories of income.

plicit provision in section 1113 (subd. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P. 2d 263 [Hawaii], U.S. S. Ct. app. pending).

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

Decision on Reargument

Memorandum Decision of
New York Supreme
Court, Albany County, in
Air Transport Association of America
v. New York State Department of
Taxation and Finance, et al., No. 11450-81
(June 10, 1982)

Memorandum Decision of
Justice De Forest C. Pitt:

The plaintiff, the Air Transport Association of America, has moved for reargument of the decision and order of this Court which found application of section 184 of the New York Tax Law constitutional and not within the prohibition of section 1113 of the Federal Aviation Act.

This Court found that section 184 of the Tax Law was in fact a tax upon the gross receipts from the sale of air transport services. The Court looked to the legislative history to determine that such tax was not barred by the Federal Aviation Act because the tax was not in any way discriminatory. Upon reargument the plaintiff has shown that the Court misinterpreted section 1113 of the Federal Aviation Act. In its original decision the Court held that if sales taxes were allowed on the sale of air transportation then certainly franchise taxes would be allowed. The Court then looked at the problems which section 1113 of the Federal Aviation Act addressed and determined that since section 184 of the Tax Law was not discriminatory that it would not be barred by said section.

The legislative drafting history of section 1113 of the Federal Aviation Act clearly shows that Congress did not intend to allow sales taxes on the sale of air transportation. Furthermore, such drafting history shows that the language of subdivision b of section 1113, which states "nothing herein shall prohibit a state . . . from the levy or collection of taxes *other*

than those enumerated in subsection (a) of this section," (emphasis added) was intended to bar any type of tax based upon the gross receipts derived from the sale of air transportation.

Since this Court mistakenly implied a requirement that taxes be discriminatory to be barred by section 1113 of the Federal Aviation Act and since it is now determined from the legislative history that said section imposes an absolute bar on any taxes upon gross receipts from the sale of air transportation, it is the determination of this Court that section 184 of the New York State Tax Law is in violation of such prohibition and is unconstitutional pursuant to the supremacy clause of the United States Constitution.

The plaintiff's motions for reargument and for summary judgment declaring that subdivision (1) of section 184 of the New York State Tax Law unconstitutional are therefore granted in all respects.

Submit order.

Initial Decision

Memorandum Decision of
New York Supreme
Court, Albany County, in
Air Transport Association of America
v. New York State Department of
Taxation and Finance, et al., No. 11450-81
(April 15, 1982)

Memorandum Decision of
Justice De Forest C. Pitt:

The plaintiff, The Air Transport Association of America, an unincorporated trade and service association consisting of 31 air carriers, has moved for summary judgment declaring subdivision 1 of section 184 of the New York Tax Law unconstitutional insofar as it seeks to tax the gross receipts of plaintiff's member air carriers.

The defendants have raised the issue of whether the plaintiff association has standing to challenge section 184 of the Tax Law because it does not pay any taxes pursuant to said section. However, the complaint alleges that the association members are subject to the tax and have paid such tax and that such taxes amount to millions of dollars each year. These allegations are sufficient to give the plaintiff standing to sue (*Boston Stock Exchange v. State Tax Com.* 429 U.S. 318).

The complaint alleges that subdivision 1 of section 184 of the Tax Law violates the supremacy clause of the United States Constitution because said section of the Tax Law imposes a tax upon the gross receipts from the sale of air transport services in violation of section 1113 of the Federal Aviation Act (49 U.S.C. section 1513). This section of the Federal Aviation Act prohibits the states from levying or collecting taxes based upon the gross receipts derived from the sale of air transportation. Subdivision 1 of section 184 of the New York State Tax Law taxes every corporation engaged in aviation three quarters of

one percent of its gross earnings from all sources within the State. Said subdivision calls the tax a "franchise tax".

The defendants contend that the tax challenged herein is a franchise tax and as such it is allowed by section 1113(b) of the Federal Aviation Act. The defendants also contend that since the tax in question covers all earnings from every source that it does not constitute a gross receipts tax barred by the Federal Aviation Act.

That the tax challenged herein is based upon gross receipts is made clear by the affidavit of Paul B. Coburn submitted in opposition to the plaintiff's motion for summary judgment. Such affidavit demonstrates the operation of the tax in question with a hypothetical example of an aviation corporation. Such corporation is taxed on interest income, the sale of a plane, rental income, income from refueling services and ticket sales for passenger transportation. Gross earnings pursuant to subdivision 1 of section 184 of the Tax Law include all of the interest income, only the capital gains income from the sale of the plane, and all rental income. The amount received for refueling operations is reduced by the cost of the fuel. Income from ticket sales is taxed in full without reduction for the cost of providing the air transportation service. Thus section 184 of the Tax Law includes a tax on air carriers on the gross receipts from ticket sales for air transportation.

However, to apply section 1113 of the Federal Aviation Act to bar the tax in question would lead to inconsistent results and would make the statute irrational, or at least ambiguous. Subdivision b of section 1113 allows franchise taxes and sales taxes. This court cannot conceive of a sales tax which is not directly or indirectly a tax on the gross earnings from sales. Furthermore, such sales taxes can amount to substantial sums of money, for example, 7% at the Albany County Airport. This exceeds many of the taxes barred by section 1113.

Since the statutory language is inconsistent and ambiguous, the court must look to its legislative history to determine the legislative intent. Such history shows that the statute was

enacted to bar discriminatory taxes levied solely against airlines in addition to normal franchise taxes and other taxes. Section 184 of the Tax Law levies a franchise tax on all transportation carriers based upon gross earnings. The plaintiff has failed to show that this tax, in effect since 1880, is in any way discriminatory. As such it is not barred by section 1113 of the Federal Aviation Act.

The motion for summary judgment in favor of the plaintiff is denied in all respects. Since it appears that section 184 of the Tax Law is constitutional, the defendants are granted summary judgment pursuant to rule 3212(b) of the CPLR.

Submit judgment.